No. 15,601

IN THE

United States Court of Appeals

For the Ninth Circuit

EVERETT D. IVEY,

Appellant,

vs.

UNITED NATIONAL INDEMNITY COMPANY, a corporation, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation, and TRANSCONTINENTAL INSURANCE COMPANY, a corporation,

Appellees.

BRIEF FOR APPELLANT.

W. C. BACON,
ALEXANDER, BACON & MUNDHENK,
315 Montgomery Street, San Francisco 4, California,
HERBERT CHAMBERLIN,
1650 Russ Building, San Francisco 4, California,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

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Appellees.

BRIEF FOR APPELLANT.

The appeal is by the defendant in a declaratory relief action.

STATEMENT OF JURISDICTION.

Paragraphs I-IV of the complaint for declaratory relief filed in court below alleged that plaintiff insurance companies were incorporated in New York or Connecticut, that defendant was a citizen of California

and resident within the district and division, and that the matter in controversy exceeded the sum of $3000 exclusive of interest and costs. R. 6-7. The allegations were admitted by defendant's answer. R. 11. Jurisdiction of the District Court is therefore sustained by 28 U.S.C. § 1332.

The final judgment of the District Court was entered March 12, 1957. R. 32. Defendant's motion for new trial was filed March 22, 1957 (R. 33) and denied April 16, 1957 (R. 41-42). Notice of appeal from the final judgment was filed May 13, 1957. R. 42. The appeal was timely. Rules of Civil Procedure, Rule 73 (a). Jurisdiction of this court to review the judgment of the District Court is therefore sustained by 28 U.S.C. §§ 1291, 1294.

STATEMENT OF THE CASE.

In general, the complaint in the action (R. 6-9) as amended (R. 10-11) alleged an actual controversy between insurer and insured as to the extent of coverage under a policy of liability insurance issued in January of 1953 for a period of one year, and sought determination and declaration of rights and other legal relations under the policy. Specifically, the insurer sought determination and declaration by the court that the insurer was not obligated to pay a judgment of $33,000 obtained against the insured by one Brian,

owner or lessor of lands or crops damaged by flooding caused by activities of the insured in October of 1953 in creating or maintaining a duck pond or lake on adjoining real property owned by him in Colusa County.

A substantially correct copy of the policy and endorsements was annexed to the complaint as an exhibit. R. 7. The original thereof was produced at the trial and admitted in evidence as Defendant's Exhibit A. R. 56.

The answer of the insured (defendant and appellant Dr. Ivey) admitted actual controversy between insurer and insured and averred the obligation of the insurer under the policy to defend the Brian action against the insured and pay the judgment of $33,000 recovered therein. R. 11-13. One of the defenses therein was as follows (R. 12):

> "Plaintiffs are estopped from claiming that the occurrence in the said action by Brian was not and is not an occurrence covered by said contract of insurance, for the reason that defendant paid and plaintiffs charged, accepted, and retained a premium for such coverage."

The policy issued by the insured bore on its face the label "Comprehensive General Automobile Liability Policy." Declaration 5 provided:

> "5. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be stated herein,

subject to all the terms of this policy having reference thereto.

COVERAGES	LIMITS OF LIABILITY	ADVANCE PREMIUM
A Bodily Injury Liability	$300,000 each person $300,000 each accident $ aggregate products	$482.2
B Property Damage Liability—Automobiles	$ 5,000 each accident	$171.8

C Property Damage Liability—Except automobile	$ each accident
	$ aggregate operations
	$ aggregate protective	

NOT COVERED	$ aggregate products $ aggregate contractual	
	Total Advance Premium	$654.07

Insuring Agreement 1 provided:

"1. Coverage A—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

Coverage B—Property Damage Liability—Automobile

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile.

Coverage C—Property Damage Liability—Except Automobile—

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay

as damages because of injury to or destruction of property, including the loss or use thereof, caused by accident."

Attached to the policy as issued was an endorsement bearing the label "Occurrence Basis." It provided:

"It is agreed that such insurance as is afforded by the policy under Coverage A applies subject to the following provisions:

1. The words 'and caused by accident' are deleted and elsewhere the word 'accident' is amended to read 'occurrence.'

2. 'Occurrence' means an event, or continuous or repeated exposure to conditions, which unexpectedly causes injury during the policy period. All such exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence. Nothing herein contained shall be held to vary, alter or extend any of the terms, conditions, agreements or declarations of the policy, other than as above stated."

Also attached to the policy as issued was an endorsement bearing the label "Individual as Named Insured." It provided:

SCHEDULE

"The named insured declares that:

1. The principal reside premises are located at 46 Hardwick Avenue, Piedmont, California and are the only premises where the named insured or spouse maintains a residence, other than property used for business, except as herein stated:

2. No business pursuits are conducted at the premises, except as herein stated:

3. The number of full time residence employees, wherever located, (a) of the named insured or spouse is NONE; and (b) of all other insureds who are residents of the named insured's household is NONE.

Limits of Liability: Liability Coverage $300.00 each occurrence. Medical Payments Coverage $250 each person.

It is agreed that:

1. The policy does not apply to any business pursuits of an insured, except (a) in connection with the conduct of a business of which the named insured is the sole owner and (b) activities in such pursuits which are ordinarily incident to non-business pursuits. 'Business' includes trade, profession or occupation and the ownership, maintenance or use of farms, and of property rented in whole or in part to others, or held for such rental, by the insured other than (a) the insured's residence if rented occasionally or if a two family dwelling usually occupied in part by the insured or (b) the garages and stables, incidental to such residence unless more than three car spaces or stalls are so rented or held.

II. Except as it applies to the conduct of a business of which the named insured is the sole owner, the policy is amended as follows:

INSURING AGREEMENTS

1. Insuring Agreement I is replaced by the following:

LIABILITY COVERAGE

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, and as damages because of injury to or destruction of property, including the loss of use thereof. * * *

4. The following Insuring Agreement is added:

PREMISES, RESIDENCE EMPLOYEE AND AUTOMOBILE DEFINED

(a) Premises. The unqualified word 'premises' means (1) all premises where the named insured or his spouse maintains a residence and includes private approaches thereto and other premises and private approaches thereto for use in connection with said residence, except property used for business, (2) individual or family cemetery plots or burial vaults, (3) premises in which an insured is temporarily residing, if not owned by an insured, and (4) vacant land, other than farm land, owned by or rented to an insured, including such land on which a one or two family dwelling is being constructed for the insured by independent contractors. * * *

EXCLUSIONS

The exclusions of the policy are amended to read:

(a) to the rendering of any professional service or the omission thereof, or to any act or omission in connection with premises, other than as

defined, which are owned, rented or controlled by an insured; * * *

(f) under the Liability Coverage, to injury to or destruction of property used by, rented to or in the care, custody or control of the insured; . . ."

The vital questions at the trial were policy construction and whether the policy covered liability for the property damage of $33,000 asserted against the insured by Brian. Duncan H. Knudsen, the *insurer's* agent who sold the insurance to the insured, testified that Dr. Ivey, the insured, bought such coverage and paid a flat charge premium of $40 for it. R. 147-149. Ben Havner, the *insurer's* superintendent of underwriting, identified a record of the insurer designated "Survey of Hazards and Application for Comprehensive General-Automobile Liability Policy," and it was admitted in evidence as Plaintiff's Exhibit No. 1. R. 62-63. It showed, as the face of the policy showed, that a total premium of $654.07 was charged of which $482.27 was specified as premium for bodily injury liability coverage and $171.80 as premium for property damage liability coverage (automobile). The same witness also identified another record of the insurer designated "Extension Schedule," and it was admitted in evidence as Plaintiff's Exhibit No. 2. R. 64. It broke down the premium charges. It showed that the premium charge of $482.27 specified for bodily injury liability coverage included a premium charge of $83.15 some of which paid for property damage liability coverage (not automobile) as well as bodily injury liability. The "Extension Schedule" showed that

where a flat charge premium was involved, the premium normally paid for both such coverages. For operations at Dr. Ivey's property in Colusa County called "duck club," the "Extension Schedule" shows a flat charge premium of $40, erroneously marked "deposit," and fails to show that it was for both bodily injury liability coverage and property damage liability coverage.

The court found that a premium of $40 was charged for insurance coverage on the Duck Club business property in Colusa County, and that Knudsen, who sold the insurance to the defendant, was agent of the *insurer*. R. 27. It also made the following findings (R. 27-28):

> "11. That the words 'Flat Charge' appearing on the Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury premium.
>
> 12. That defendant Everett D. Ivey, did not purchase property damage insurance coverage for either the Duck Club or the office business property.
>
> 13. That plaintiff, United National Indemnity Company, did not provide property damage insurance for either the Duck Club or the office business property.
>
> 14. That the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation or maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes

defined, which are owned, rented or controlled by an insured; * * *

(f) under the Liability Coverage, to injury to or destruction of property used by, rented to or in the care, custody or control of the insured; . . ."

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> 12. That defendant Everett D. Ivey, did not purchase property damage insurance coverage for either the Duck Club or the office business property.
>
> 13. That plaintiff, United National Indemnity Company, did not provide property damage insurance for either the Duck Club or the office business property.
>
> 14. That the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation or maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes

activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey.

15. That there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the 'Individual As Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement."

These findings of fact were largely repeated in the conclusions of law. R. 28-29. The judgment decreed that "Policy #10122 and endorsements attached thereto does not provide property damage liability insurance to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property." R. 31. Judgment on the findings of fact and conclusions of law was entered on March 12, 1957. R. 32.

Defendant's motion for new trial filed March 22, 1957 (R. 33-34) prompted a motion by plaintiffs to strike testimony of certain witnesses from the record as violative of the "parole evidence rule" or hearsay. R. 34-41. Plaintiffs' motion was granted. Defendant's motion was denied. R. 41-42. As now required by amendment of Rule 18 of this Court, the Exhibits are listed in the appendix to this brief.

SPECIFICATION OF ERRORS.

1. The District Court erred in finding (Finding 11) that "the words 'Flat Charge' appearing on the

Extension Schedule opposite Duck Club applies to the amount of premium charged with respect only to the Bodily Injury premium," for the reason that the finding is clearly erroneous, the evidence is insufficient to support it, and the finding is contrary to the evidence and the law.

2. The District Court erred in finding (Finding 12) that "defendant, Everett D. Ivey, did not purchase property damage coverage for either the Duck Club or the office business property," for the reason that the finding is clearly erroneous, the evidence is insufficient to support it, and the finding is contrary to the evidence and the law.

3. The District Court erred in finding (Finding 13) that "plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for either the Duck Club or the office business property," for the reason that the finding is clearly erroneous, the evidence is insufficient to support it, and the finding is contrary to the evidence and the law.

4. The District Court erred in finding (Finding 14) that "the Comprehensive General Automobile Liability Policy #10122 issued by plaintiff, United National Indemnity Company, does not provide property damage liability insurance arising from the operation and maintenance of the Duck Club property of defendant, Everett D. Ivey, for the reason that it expressly excludes activities arising out of the operation of a business enterprise solely owned by the insured, Everett D. Ivey," for the reason that the finding is clearly erroneous, the evidence is insufficient to sup-

port it, and the finding is contrary to the evidence and the law.

5. The District Court erred in finding (Finding 15) that "there is no ambiguity in the said Comprehensive Liability Policy #10122; that there is no ambiguity in the 'Individual as Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement," for the reason that the finding is clearly erroneous, the evidence is insufficient to support it, and the finding is contrary to the evidence and the law.

6. The District Court erred in concluding as a matter of law (Conclusion 1) that "defendant, Everett D. Ivey, did not purchase property damage insurance coverage for his Duck Club properties," for the reason that the conclusion is contrary to the law and the evidence.

7. The District Court erred in concluding as a matter of law (Conclusion 2) that "plaintiff, United National Indemnity Company, did not provide property damage insurance coverage for Everett D. Ivey's Duck Club properties," for the reason that the conclusion is contrary to the law and the evidence.

8. The District Court erred in concluding as a matter of law (Conclusion 3) that "the Named Insured Endorsement of policy of insurance referred to expressly excludes business activity of the defendant, Everett D. Ivey, of which he is the sole owner," for the reason that the conclusion is contrary to the law and the evidence.

9. The District Court erred in concluding as a matter of law (Conclusion 4) that "plaintiffs are not estopped from claiming that the occurrence in the action of Brian v. Ivey hereinabove mentioned is not an occurrence covered by said policy of insurance," for the reason that the conclusion is contrary to the law and the evidence.

10. The District Court erred in concluding as a matter of law (Conclusion 5) that "plaintiffs had no obligation to provide a defense to defendant Everett D. Ivey, in said action and defendant is not entitled to recover on his cross-complaint," for the reason that the conclusion is contrary to the law and the evidence.

11. The District Court erred in concluding as a matter of law (Conclusion 6) that "there is no ambiguity in the said Comprehensive General Automobile Liability Policy #10122; that there is no ambiguity in the 'Individual as Named Insured' Endorsement; that there is no ambiguity between the policy and the endorsement," for the reason that the conclusion is contrary to the law and the evidence.

12. The District Court of Appeal erred in concluding as a matter of law (Conclusion 9) that "plaintiffs are entitled to a judgment declaring that the policy and endorsement do not provide for property damage insurance coverage to defendant, Everett D. Ivey."

13. The District Court erred in concluding as a matter of law (Conclusion 10) that "judgment be entered in favor of plaintiffs and against defendant in said action with costs," for the reason that the conclusion is contrary to the law and the evidence.

14. The District Court erred in entering judgment for plaintiffs.

15. The District Court erred in decreeing that "United National Indemnity Company Comprehensive General Automobile Liability Policy #10122 and endorsements attached thereto does not provide property damage liability insurance to defendant, Everett D. Ivey, for occurrences arising out of the operation and maintenance of the Duck Club property."

16. The District Court erred in granting the motion of plaintiff United National Indemnity Company to strike testimony from the record.

17. The District Court erred in denying defendant's motion for new trial.

ARGUMENT.

1. **THE JUDGMENT AGAINST DR. IVEY THE INSURED SHOULD BE REVERSED FOR THE REASON THAT HE BOUGHT AND PAID FOR INSURANCE OBLIGATING THE INSURER TO PAY THE PROPERTY DAMAGE CLAIM OF $33,000 ASSERTED AGAINST THE INSURED BY ONE BRIAN, AND THE INSURER IS ESTOPPED FROM ASSERTING THE CONTRARY.**

(Specification of Error No. 9.)

The case was before the District Court on the ground of diversity. R. 6-7. Therefore, California law was applicable. (*Standard Ins. Co. of Detroit v. Winget,* 9 Cir. 1952, 197 F. 2d 97, 99; *American Employers' Ins. Co. v. Lindquist,* D.C. Cal. 1942, 43 F. Supp. 610, 614.)

The defense of estoppel was set up in defendant's answer as follows (R. 12):

"Third Defense

> Plaintiffs are estopped from claiming that the occurrence in the said action by Brian was not and is not an occurrence covered by said contract of insurance, for the reason that defendant paid and plaintiffs charged, accepted, and retained a premium for such coverage."

One of the findings made by the court (No. 7) was that a premium of $40 was charged for insurance coverage on the Duck Club business property in Colusa County, California. R. 26. And another finding by the court (No. 10) was that Duncan H. Knudsen was *the agent of the insurer* who sold the insurance to Dr. Ivey. R. 27.

Defendant produced Knudsen as a witness at the trial. He testified at length. R. 107-156. It is true that some of his testimony was stricken on motion of the insurer *after* the findings were signed and judgment entered. R. 34-42. Specification of Error No. 16 challenges that ruling. But it is also true that enough of Knudsen's testimony remained in the record to establish without dispute that *as agent for the insurer* he sold to Dr. Ivey for a flat charge premium of $40, which Dr. Ivey paid, for insurance coverage obligating the insurer to pay the property damage claim of $33,000 asserted against Dr. Ivey by Brian. R. 108-114, 118-120, 124-127, 147-149.

On the record, then, the insurer is estopped from asserting that its policy of insurance did not include or extend such coverage. (*Motor T. Co. v. Great American Indem. Co.,* 6 Cal. 2d 439, 444, 58 P. 2d 374; *Ames*

age." Elsewhere in the record this Court is advised that Dr. Ivey paid $83.15 for such "liability coverage," and that it is included in the amount of $482.27 appearing opposite the words "Coverage A—Bodily Injury Liability" in Declaration 5 on the first page of the policy.

It was conceded by the insurer at the trial that Endorsement #1 extended *some* property damage liability coverage to Dr. Ivey. Endorsement #3 made that concession inevitable. But the insurer was able to persuade the trial court that Endorsement #1 merely protected Dr. Ivey against property damage liability resulting from his nonbusiness pursuit of business pursuits. That, it is respectfully submitted, simply does not make sense. It is unreasonable to suppose that Dr. Ivey paid an additional premium of $83.15 for phantom insurance. The undisputed testimony of *the agent for the insurer* who sold Dr. Ivey the insurance that of the $83.15 additional premium $40 was a flat charge premium for coverage and protection against property damage liability of the sort asserted against him in the sum of $33,000 by Brian.

The settled rule in California and perhaps uniformly elsewhere is stated in *Continental Casualty Co. v. Phoenix Const. Co.,* 46 Cal. 2d 423, 430, 296 P. 2d 801 (citations omitted):

> "(11) It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. (12) If semantically permissible, the contract will be given such construction as will fairly achieve its

> object of securing indemnity to the insured for the losses to which the insurance relates. (13) If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against, the amount of liability, or the person or persons protected, the language will be understood in its most inclusive sense, for the benefit of the insured."

Here it is semantically permissible to interpret Endorsement #1 as extending to Dr. Ivey coverage and protection against property damage liability resulting from his business pursuits in connection with any business of which he is the sole owner, and also resulting from his nonbusiness pursuits incident thereto, and that except where the provisions of the body of the policy apply, the policy is amended to extend full coverage to Dr. Ivey for personal liability for bodily injury and property damage. The trial erred in interpreting the policy otherwise and relieving the insurer from the obligation to pay the damage claim of $33,000 asserted against the insured by Brian.

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3. THE DISTRICT COURT ERRED IN FINDING AND CONCLUDING THAT THERE WAS NO AMBIGUITY IN THE POLICY OR ITS ENDORSEMENTS. (Specification of Errors Nos. 5 and 11.)

It is the position of appellant that since the policy was semantically susceptible to the interpretation advocated in the preceding subdivision but the court did not adopt it, the least that can be said is that ambiguity and uncertainty existed and the court's

finding and conclusion to the contrary are erroneous. Under such circumstances, of course, extrinsic evidence would be admissible to explain or remove such ambiguity or uncertainty.

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4. **THE COURT ERRED IN GRANTING THE MOTION OF PLAINTIFF UNITED NATIONAL INDEMNITY COMPANY TO STRIKE TESTIMONY FROM THE RECORD. (Specification of Error No. 16.)**

The motion made and granted was addressed to specific testimony of Duncan H. Knudsen relative to his acts *as agent for the insurer*. R. 34-42. In its motion the parts sought to be stricken were quoted, the grounds of objection stated, and reference made to the parts of the reporter's transcript where the matters attacked would be found. In the record on appeal the matters stricken appear at pages 115-117, 120-121, 123, 127-128. Appellant quotes the testimony stricken and the grounds of objection thereto:

> "Mr. Bacon. Q. Mr. Knudsen, when you took the matter up with the Oakland branch office of the United National Indemnity Company to obtain that initial policy, did you discuss with the company representative there the coverages that you desired for Dr. Ivey?
>
> A. Yes, I did. We requested the combination personal liability on the various properties I have described a few minutes ago.
>
> Q. And was the subject of rates discussed at that time?
>
> A. Yes, this subject did come up because of the fact that two of these parcels that I have men-

tioned did not have buildings on them and were vacant land. The question was asked whether—what they were used for, and the reply was that they were used for duck shooting during the duck season. The underwriter expressed some desire for a premium because vacant land is ordinarily rated without a premium charge. There was then negotiated a flat charge to embrace these two parcels plus the parcel that had the six buildings located thereon, which is away from the other two.

Q. And when you mention a negotiated rate for those properties, who do you mean by that?

A. Well, I mean as opposed to a calculated rate, which would be a rate appearing in a manual providing a rate per location or per acre or per hundred dollars of receipts or whatever the measure might be. That is what we call a calculated rate. A negotiated rate would be an agreed premium negotiated between the agent and the company as to a particular exposure.

Q. In the negotiation for and fixing of that rate was the subject of coverage discussed; that is, whether it included property damage or not?

A. It was assigned and rated under the comprehensive personal coverage which is a single limit insurance; in other words, including property damage and bodily injury liability.

Q. And what premium do you recall was——

A. It was in the neighborhood of $30; I don't recall exactly.

Q. And that was in the policy we have been discussing in 1951? (Page 82, Line 11-Page 83, Line 24.)

A. '51; correct."

Plaintiff moves that the above testimony be stricken on the grounds that the written contract

of insurance between plaintiff and defendant speaks for itself, it is the culmination of preliminary negotiations, is not ambiguous and to permit evidence of preliminary negotiations would be a violation of the Parole Evidence Rule.

"Q. I show you Plaintiff's Exhibit No. 2, which is identified as an extension schedule, and I will ask you to look at that and tell me what that calculation on there with respect to charges and premiums means—the notations on there, what they mean.

A. Well, there are——

Mr. Taylor. Excuse me, Mr. Knudsen. Your Honor, I understand that our objection will go to this, too, because of the fact that it speaks for itself.

Mr. Bacon. This is the company's agent, your Honor, and he has negotiated this insurance, so we will know and can only know from his mouth from what they were doing in fixing these rates, and what they were providing.

The Court. I will allow it as I did the others subject to a motion to strike and over your objection. I call your attention to the fact that I think your legal objection is good. However, I am giving you a record on it.

The Witness. Proceed?

Mr. Bacon. Yes.

A. There are again a dwelling at 46 Hardwick Ave. rated at a flat charge on the comprehensive personal basis including public liability and property damage. This is true also of the property at Hamburg; one at 40 Hardwick Ave.; the farm premises at Alamo, and the acreage at the Willows locations. Again this was negotiated on a flat charge basis that the other four properties are and at a charge of $40. There is a fifth location

which is written on a liability only basis at 230 Grand Avenue, indicating a liability rate of .896 times an area of 125 square feet, extended to a minimum liability of $8." (Page 87, Line 9—Page 88, Line 13.)

Plaintiff moves to strike the above answer on the same grounds heretofore given that the insurance policy being a written contract speaks for itself.

"Q. When you find a reference in this column headed "Rates" to a flat charge under both columns B.I. and D.P., what does that mean, Mr. Knudsen?

A. That contemplates a flat charge premium embracing public liability and property damage which I had signed originally as comprehensive personal liability insurance." (Page 90, Line 11-Line 16.)

Plaintiff moves to strike the above testimony on the same grounds as heretofore given, that the written contract speaks for itself.

"Q. Now I will ask you this question, then, Mr. Knudsen; on this record of this policy, this extension schedule, did Dr. Ivey pay a premium for property damage coverage as well as bodily injury coverage under the individual endorsement on the properties in Colusa County?

Mr. Taylor. To which we object, your Honor; That is exactly the question to be decided by your Honor. That would be the opinion and conclusion of this witness.

Mr. Bacon. I again remind the Court this is the company's agent, not a broker. This is the company's agent and he is in a position to say what premiums were negotiated with respect to this policy and what coverage was sought and obtained; and I think when we ask him if Dr.

Ivey paid a premium for that coverage, we are entitled to the answer from the company's mouthpiece.

Mr. Taylor. Your Honor, the schedules and the exhibits are in writing, and they speak for themselves.

Mr. Bacon. No, they do not; that is the point.

The Court. In the interests of time I will allow it in subject to the same motion so that you have not lost any of your legal rights if your position is correct. All right.

Mr. Bacon. Will you please answer the question: Shall I reframe it or will you read it to him?

(Question read by the reporter.)

A. Yes, that was the premium to which I referred earlier in testimony as being negotiated.

Q. And did you tell that to Dr. Ivey?

A. Yes, sir." (Page 95, Line 10-Page 96, Line 12.)

Plaintiff moves to strike the above testimony on the grounds that the written contract of insurance speaks for itself and to permit testimony of prior negotiations violates the Parole Evidence Rule.

"Mr. Bacon. Q. Mr. Knudsen, after your discussion with Dr. Ivey and obtaining all the information about his properties as you have told us, what insurance coverage did you provide him? What did he get under this policy we are concerned here with?

Mr. Taylor. Your Honor, the policy speaks for itself as to what he got. We will object to any attempt to enlarge upon it, as to what he got.

Mr. Bacon. This man is an agent of the company and he knew what was sought and he knew

what was given. Now, if by any chance it can be said that this policy doesn't cover it, we are certainly entitled to have the benefit of what was sought and what was given.

The Court. You are limited to the policy itself.

Mr. Bacon. I don't understand that to be the law, your Honor.

The Court. Well, if it isn't the law, you persuade me otherwise. I will give you full opportunity.

Mr. Bacon. We will have some authorities on that, your Honor.

The Court. I will allow it subject to a motion to strike your objections.

Mr. Bacon. Do you understand the question?

The Witness. The question again, please Mr. Bacon.

Q. I asked you if after you had obtained all the information from Dr. Ivey about his properties and his requests for insurance, did you provide him with the coverage he asked?

A. Yes, which was public liability and property damage with the exception of this office location which I mentioned previously.

Q. That was what the doctor wanted and that was what you gave him.

A. That is correct." (Page 124, Line 8-Page 125, Line 15.)

Plaintiff moves to strike the above testimony on the grounds heretofore given that the written policy of insurance speaks for itself.

It was error to strike the foregoing matter, for as already pointed out it was relevant, competent, and material to the defense of estoppel. Moreover, it was admissible to explain the true consideration for the

contract of insurance (*Simmons v. California Inst. of Technology,* 34 Cal. 2d 264, 209 P. 2d 581; *Shiver v. Liberty etc. Assn.,* 16 Cal. 2d 296, 299, 106 P. 2d 4), or to explain ambiguity or uncertainty in the insurance contract (Calif. Code Civ. Proc., §1856).

That elimination of the testimony operated to the prejudice of appellant, is obvious.

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5. **THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL. (Specification of Error No. 17.)**

This specification need not be elaborated. Appellant thinks it must be plain from what has previously been said that the trial court abused its discretion in denying his motion for new trial.

CONCLUSION.

Appellant therefore respectfully submits that the judgment appealed from should be reversed with directions to the lower court to enter judgment in his favor.

Dated, San Francisco, California,
September 26, 1957.

W. C. Bacon,
Alexander, Bacon & Mundhenk,
Herbert Chamberlin,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

LIST OF EXHIBITS